IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALAN DAVID MCCORMACK,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS, THE DIVISION OF ADULT INSTITUTIONS, GARY HAMBLIN, KATHRYN ANDERSTON, DANIEL WESTFIELD, ACCESS SECUREPAK, J.L. MARCUS, INC., UNION SUPPLY DIRECT, WALKENHORST'S, THOMAS GOZINSKE, RENEE SCHUELER, KAREN GOURLIE, WELCOME F. ROSE, THE OFFICE OF THE SECRETARY, WISCONSIN DEPARTMENT OF JUSTICE and J.B. VAN HOLLEN,

Defendants.

OPINION AND ORDER

12-cv-924-bbc

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In this proposed civil action, pro se plaintiff Alan David McCormack alleges that defendants participated in a conspiracy to include a hidden 10% kickback and a duplicative 5% tax in prison canteen catalogues, in violation of the federal and state antitrust laws and the equal protection clause of the Fourteenth Amendment.

Plaintiff has made an initial partial payment of the filing fee under 28 U.S.C. § 1915(b)(1), so his complaint is ready for screening. Because he is a prisoner, I must screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who

by law cannot be sued for money damages. 28 U.S.C. §§ 1915(e)(2) and 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Having reviewed the complaint, I conclude that plaintiff will not be allowed to proceed at this time. Plaintiff's allegations fail to state a claim under federal antitrust laws, because the challenged restraints fall within the state action immunity doctrine of Parker v. Brown, 317 U.S. 341, 350-52 (1943), or under the equal protection clause, because the additional 5% tax has a rational basis. Because I am dismissing his federal claims, I will decline to exercise supplemental jurisdiction over his remaining state law antitrust claim and dismiss the complaint.

In his complaint, plaintiff has alleged the following facts.

ALLEGATIONS OF FACT

Plaintiff Alan David McCormack is incarcerated at the Fox Lake Correctional Institution. Defendant Department of Corrections is an administrative department of the State of Wisconsin. Defendants Division of Adult Institutions and the Office of the Secretary are subdivisions of the Department of Corrections. Defendant Gary Hamblin is Secretary of the Wisconsin Department of Corrections, defendant Kathryn Anderson is its chief legal counsel and defendant Daniel Westfield is a "security chief." Defendants Thomas Gozinske, Renee Schueler, Karen Gourlie and Welcome F. Rose are inmate complaint examiners. Defendant J.B. Van Hollen is Attorney General for the State of Wisconsin.

The Department of Corrections prohibits all state inmates from purchasing personal property from any business other than through the prison canteens. Four vendors contract with the department to sell products to prisoners: defendants Access Securepak, J.L. Marcus, Inc., Union Supply Direct and Walkenhorst. The Department of Corrections, the Division of Adult Institutions, Hamblin, Anderson and Westfield require these four vendors to develop catalogs specifically for prison canteens that include in the prices a "hidden" 10% "kickback/rebate" and 5% sales tax. The catalogs do not mention these markups. When inmates purchase items, the vendors add an additional 5% sales tax based on the location of the prison facility. Each month, the vendors issue checks to the state's prison facilities for the sales, and this money is deposited in the warden or superintendent's general purpose fund to spend at their discretion.

Defendants Gozinske, Schueler, Gourlie, Rose, the Office of the Secretary, Wisconsin Department of Justice and J.B. Van Hollen were "notified of[] and aware of" the kickbacks and double taxes but took no action to correct them.

OPINION

A. Antitrust Claim

The core of plaintiff's claim is that the Department of Corrections permits prisoners to purchase property only from its prison canteens and compels the companies that offer the canteen catalogs to include a 15% profit for the prisons, which he believes violates the Sherman Act, the Clayton Act and the Robinson-Patman Act. (Plaintiff also cites the Anti-

Kickback Act of 1986, 41 U.S.C. §§ 8701-8707 (formerly 41 U.S.C. § 51-54), but this statute prohibits kickbacks in federal contracts and does not include a private right of action. 41 U.S.C. §§ 8706, 8707.) To satisfy the pleading requirements with respect to his antitrust claims, plaintiff's complaint must include enough "[f]actual allegations . . . to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007) (citations omitted). In addition, his allegations must suggest that the "claimed injuries are of the type the antitrust laws were intended to prevent and reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation." Kochert v. Greater Lafayette Health Services, Inc., 463 F.3d 710, 716 (7th Cir. 2006) (internal quotation marks omitted).

Plaintiff's allegations fail to state a claim under federal antitrust statues, because the conduct about which he complains falls within the state action immunity doctrine of Parker v. Brown, 317 U.S. 341, 350-52 (1943). See also Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032, 1040 (2d Cir. 1986) (Parker state action defense applies equally to Clayton Act claims). In Parker, 317 U.S. at 351, the Supreme Court held that the Sherman Act does not prohibit a state from restraining competition when it is acting as a sovereign. Private parties are also shielded by this state antitrust immunity if the alleged restraint is "clearly articulated and affirmatively expressed as state policy" and state officials supervise actively any private anticompetitive conduct. California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

Wisconsin authorizes its Department of Corrections to run prison canteens and to

use funds from the canteens for a general fund at each institution. Wis. Stat. § 301.27 provides, in part, that the department

> shall establish and maintain a revolving fund not exceeding $100,000 in any of the state institutions administered by the department, for the education, recreation and convenience of the patients, inmates and employees, to be used for the operation of vending stands, canteen operations, reading clubs, musical organizations, religious programs, athletics and similar projects.

Wis. Stat. § 301.27. The statute also exempts this fund from the general statutory rule that state agencies must return any money they collect to the state treasury. Id. Under this authority, the Department of Corrections requires each institution to maintain a canteen. Wis. Admin. Code DOC § 309.42, 309.52. The Department of Adult Institutions also maintains a policy that "[a]ll goods, except stamps and embossed envelopes, will be marked up approximately 10% over cost before any required sales tax is collected. The 10% mark up applies to canteen whether operated by the institution/center or contracted vendor." DAI Policy 309.21.01(I)(C) (July 22, 2010).

Plaintiff's allegations against all of the defendants fall within the core of the Parker state immunity doctrine. Federal antitrust law does not prohibit Wisconsin from establishing a monopoly in its prisons canteens or charging prisoners higher than market prices. Dehoney v. Sour Carolina Dept. of Corrrections, No. 94-3169-21BD, 1995 WL 842006 (D.S.C. July 31, 1995) (dismissing under Parker inmate's claim that prison violated Sherman Act by requiring 10% markup), aff'd 72 F.3d 126 (4th Cir. 1995) (per curium). Plaintiff's claim is indistinguishable from the claim rejected in Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001). In Arsberry, the plaintiffs alleged that Illinois granted companies the

exclusive right to provide telephone services for each prison and required them to return 50% of their revenue as a "kickback" to the prison. The court explained that "[s]tates and other public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government." Id. at 566. Wisconsin is entitled to use its monopoly power to raise additional revenue from prisoners. Id. Accordingly, none of the state defendants or their employees have violated federal antitrust law.

With respect to the four private vendors, plaintiff alleges only that they complied with the required state policy, which brings them squarely within the principle expressed in Midcal. See Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721, 1729 (1985) (explaining that whether private parties were compelled "often is the best evidence that the State has a clearly articulated and affirmatively expressed policy to displace competition."). As the court of appeals explained in Arsberry, state contractors do not "violate the antitrust laws by becoming state concessionaires, provided [they] do not collude among themselves or engage in other anticompetitive behavior, of which charging high prices as a state concessionaire is not a recognized species." Id. Therefore, plaintiff's federal antitrust claim will be dismissed for failure to state a claim.

B. Equal Protection

Plaintiff's second federal claim is that defendants violated his right to equal protection under the Fourteenth Amendment by imposing double the sales tax on inmates' canteen purchases. Inmates are not a protected class and this tax does not burden any fundamental

rights, so plaintiff must allege that the discriminatory tax is not rationally related to any legitimate governmental purpose. Fitzgerald v. Racing Association of Central Iowa, 539 U.S. 103, 107 (2003); Wroblewski v. City of Washburn, 965 F.2d 452, 460 (7th Cir. 1992) (dismissal appropriate if complaint does not allege sufficient facts to overcome presumption of rationality). States "have broad powers to impose and collect taxes" and may impose different taxes on classes of property or persons without violating the equal protection clause so long as "the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy." Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia, 488 U.S. 336, 344 (1989) (quotation omitted). The additional "tax" on prisoner's canteen purchases goes into each prison's general fund to serve the purposes listed in Wis. Stat. § 301.27, and it is reasonable to support prison programs with a higher sales tax on prisoners' purchases. Accordingly, plaintiff's equal protection claim under the Fourteenth Amendment must be dismissed.

C. State Law Claims

The final question is what to do with plaintiff's state antitrust law claims under Wis. Stat. § 133. When all the federal claims in a case have been dismissed, the general rule is that a district court should decline to exercise jurisdiction over any remaining state law claims under 28 U.S.C. § 1367(c)(3). Redwood v. Dobson, 476 F.3d 462, 467 (7th Cir. 2007). Although exceptions to this general rule exist, none of them apply in this case, so I am declining to exercise jurisdiction over plaintiff's state law claims.

ORDER

IT IS ORDERED that

1. Plaintiff Alan David McCormack is DENIED leave to proceed on his claims that defendants violated the Sherman Act and the Fourteenth Amendment, and these claims are DISMISSED for failure to state a claim.

2. The court DECLINES to exercise supplemental jurisdiction over plaintiff's state law claims.

3. Because plaintiff's complaint is being dismissed for failure to state a claim upon which relief may be granted, plaintiff will be assessed a STRIKE under 28 U.S.C. § 1915(g).

Entered this 12th day of March, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge